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Supreme Court, U.S.
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No. 04-1527

In The Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENT MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state has conditioning authority pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, for the relicensing of a hydroelectric dam, the operation of which involves the discharge of water back into the river after it has passed through the turbines and other dam structures, and results in continuing negative impacts to the water quality of the river?

2. Whether "reopener" conditions in a water quality certification are authorized by Section 401, and are consistent with the Federal Energy Regulatory Commission's ("FERC") licensing authority under the Federal Power Act, 16 U.S.C. §§ 791a *et seq*.

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MAINE'S BRIEF IN OPPOSITION

Respondent Maine Department of Environmental Protection respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Maine Supreme Judicial Court, sitting as the Law Court, issued February 15, 2005, reproduced in the Appendix to the Petition for Writ of Certiorari ("App.") at A-1 to A-18, and reported at 2005 ME 27.

STATEMENT OF THE CASE

I. Factual Background

The parties agree that the material facts are generally undisputed. For more than fifteen years the Maine Department of Environmental Protection ("DEP") has been issuing water quality certifications, pursuant to section 401 of the Federal Water Pollution Control Act, known as the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, 33 U.S.C. § 1341 ("Section 401"), for the licensing of existing hydropower projects by FERC on the grounds that releases of water from a dam constitute "any discharge," whether or not the releases meet the definition of "discharge of pollutants."[1] Likewise, FERC's regulations require that applicants for an

[1] *See, e.g., Ridgewood Maine Hydro Partners, L.P.*, 105 F.E.R.C. ¶ 62,137 (2003); *FPL Energy Maine Hydro LLC*, 101 F.E.R.C. ¶ 62,179 (2002); *Bangor Hydroelectric Company*, 86 F.E.R.C. ¶ 62,242 (1999); *Kennebec Water District*, 88 F.E.R.C. ¶ 61,117 (1999); *Bangor Hydro-Electric Company*, 83 F.E.R.C. ¶ 61,038 (1998); *Central Maine Power Company*, 81 F.E.R.C. ¶ 61,249 (1997); *Town of Madison-Department of Electric Works*, 81 F.E.R.C. ¶ 61,252 (1997); *Maine Public Service Company*, 65 F.E.R.C. ¶ 62,215 (1993); *Central Maine Power Company*, 65 F.E.R.C. ¶ 62,154 (1993); *Great Northern Paper Company*, 44 F.E.R.C. ¶ 62,368 (1988).

original license or for relicensing file a water quality certification or waiver thereof by the state, without regard to whether the applications propose a "discharge of pollutants." 18 C.F.R. §§ 4.34(b)(5)(i), 16.8.

Documents issued by FERC in the course of the FERC licensing of petitioner's dams demonstrate that FERC anticipated that Maine would issue a water quality certification for the projects. *See, e.g.*, Law Court Appendix ("Law Court App.") at 119, 238. FERC has now issued forty-year licenses for these dams incorporating all conditions – including the "reopeners" – of Maine's water quality certification without comment. *S.D. Warren Company, Orders Issuing New Licenses*, October 2, 2003, 105 F.E.R.C. ¶¶ 61,009 to 61,013 ("*FERC Licenses*").[2]

The five dams in issue here were constructed in the early 1900s, but were not licensed by FERC until between 1979 and 1981. App. at A-2. This is the first time that Maine's existing water quality laws, which were substantially revised in 1986,[3] have been applied to petitioner's projects.

All of the dams are located on the Presumpscot River and are operated in a run-of-river mode, with outflow being approximately equal to inflow. App. at A-2. The dams provide electricity for petitioner's downstream paper mill. *Ibid.* Each dam has a "bypass reach" between the

[2] Petitioner appealed FERC's licensing orders to the Court of Appeals for the District of Columbia Circuit on grounds separate from those raised here. The court recently denied the petition for review. *S.D. Warren Co. v. FERC*, No. 04-1105 (D.C. Cir., filed May 6, 2005).

[3] *See* Maine Legislative Document 2283 (112th Legis. 1986); Me. Rev. Stat. Ann., Tit. 38, §§ 464 *et seq.* (West 2001 & Supp. 2004).

dam and the downstream end of the tailrace channel, from which water is diverted to run the turbines. App. at A-75 to A-77. Water is run through the turbines, enters the tailrace and then is discharged back to the river at the end of the tailrace. *Ibid.* In addition, the bypass reaches receive both leakage and spillage flows, and petitioner proposed additional flows for those reaches upon relicensing. App. at A-78 to A-81. None of the dams add "pollutants" as that term is defined in Section 502(6) of the Clean Water Act. 33 U.S.C. § 1362(6).

It is undisputed that the dams and their continuing operation adversely affect the water quality of the Presumpscot River, and lead to violations of water quality standards. The Board of Environmental Protection ("BEP") found[4] that certain of the dams "clearly cause or contribute to the current violation of dissolved oxygen standards in several parts of the Presumpscot River."[5] App. at A-51. The BEP further found:

> Warren's dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels and sea-run fish to their natural spawning and nursery waters; that the dams have eliminated the

[4] The Law Court accepted the factual findings of the BEP and that determination is not at issue here. App. at A-12.

[5] Specifically, the BEP found that [w]ere these dams not in place and operating in such a way as to reduce natural reaeration, to increase time of travel, to increase water temperature, and to create settling basins for sediments and nutrients, dissolved oxygen standards would be met in the Gambo, Little Falls, and Sacarappa impoundments." *Ibid.*

> opportunity for fishing in long stretches of river, and that the dams have prevented recreational access to and use of the river.

App. at A-49.

II. Procedural Background

In April 2003, the DEP approved water quality certification for the continued operation of petitioner's projects, but attached conditions necessary to assure that the projects would comply with the State's water quality laws. A-74 to A-140. With regard to several of these conditions, the DEP required petitioner to conduct studies to assess the effectiveness of the measures required, the so-called "reopener" conditions. In these conditions, the DEP reserved the right, after notice to the petitioner and opportunity for hearing, to require reasonable changes to ensure continuing compliance with water quality standards. App. at A-124 to A-137 (Conditions 1(H), 3(F), 4(F), 5(G) and 6(F)).

Petitioner appealed the water quality certification first to the BEP (App. A-35 to A-73), then to the Maine Superior Court (App. A-19 to A-34), and finally to the Maine Law Court (App. A-1 to A-18). In each case, petitioner's argument that Maine lacked jurisdiction to issue a water quality certification was rejected, as was its contention that the reopener conditions exceeded the DEP's conditioning authority under the Clean Water Act and Maine law, and violated the Federal Power Act, 16 U.S.C. §§ 791a *et seq*. ("FPA").

III. Decision of the Maine Law Court

Before the Law Court, petitioner did not brief, and therefore the Law Court did not analyze, the import of *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). With regard to petitioner's jurisdictional challenge, the Law Court first looked to the definition of "discharge" in Section 502 of the Clean Water Act, 33 U.S.C. § 1362 ("Section 502"). App. at A-9. Section 502(16) provides that when used without qualification, as here, "the term discharge . . . *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis added). The court found that "this statement of inclusion provides 'the nearest evidence we have of definitional intent by Congress'." App. at A-6 (*quoting North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) ("*North Carolina*")). The court thus used the definition of "discharge of pollutants," as a guide to the meaning of "any discharge," finding that "an 'addition' is the fundamental characteristic of any discharge." App. at A-6 (citations omitted).

The Law Court reasoned that "water that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway." App. at A-10. Since this is an "addition," and since "*any addition* . . . is fundamental to the definition of discharge" under Section 401, the court held that "water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of section [401]." App. at A-10 (emphasis added).

The Law Court similarly rejected petitioner's challenge of numerous certification conditions, including the reopener clauses. The Law Court found that:

> This authority is essential because if the conditions are not as effective as planned, the water quality standards will not be met and the BEP's goal to "restore and maintain the chemical, physical and biological integrity of the State's waters . . . " will not be achieved during the forty-year term of the FERC license.

App. at A-15 to A-16. The court thus found that the reopeners fit within the literal language of Section 401(d), which requires a certification to set forth "any" limitation "necessary to assure" compliance with water quality standards, 33 U.S.C. § 1341(d); and that they were consistent with this Court's broad reading of the states' conditioning authority in *PUD 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 713 (1994) (*"PUD 1"*). App. at A-13. The court further held that the reopeners were not prohibited by the FPA and were authorized under Maine law. App. at A-13 to A-16.

REASONS FOR DENIAL OF THE WRIT

There is no compelling reason for the Court to review the Maine Law Court's decision. Regarding the first question, petitioner's core argument was not evaluated in the briefs or by the Law Court below. The import of *Miccosukee*, its analysis of Section 402 of the Clean Water Act, 33 U.S.C. § 1342 ("Section 402"), and its application to Section 401 was not thoroughly briefed and argued to the Maine Law Court by petitioner. Neither *Miccosukee*, nor Section 402 itself was cited in petitioner's Law Court briefs or,

concomitantly, mentioned by the Law Court. In sum, the petition's principal argument was never fully analyzed by a lower court and, therefore, this issue is not appropriate for the Court's consideration. The Court should decline to consider it on this ground alone.

The foundation of the petition on the first question is that the Law Court's decision conflicts with this Court's decision in *Miccosukee*. No conflict exists because that case involved the issue of whether a National Pollutant Discharge Elimination System ("NPDES") permit was required *under Section 402*, and not whether a water quality certification was required *under Section 401*. Section 401 and Section 402 are different sections, with different language, different purposes, and a different history of interpretation by the courts and the EPA.

There is no conflict with the decisions of other courts. The Law Court's decision is consistent with decisions of the courts of appeal that have interpreted Section 401, both in the context of FERC licenses and in other contexts. While the interpretation of Section 401 by the Maine Law Court may contain nuances not yet employed by other courts, the approach is similar and results in the same outcome.

Significantly, the Law Court's decision fully conforms with EPA's interpretation of what constitutes a "discharge" under Section 401, and with FERC's regulations and long-standing practice and interpretation of the states' Section 401 certification authority. In this matter, moreover, FERC has incorporated the conditions contained in the certification in its newly issued licenses for the projects. In light of this, and the fact that Congress has given the states an

important role in protecting the water quality within their borders, the suggestion that the Maine Law Court was "complicit" in a "power grab" by the State of Maine, Petition for Writ of Certiorari ("Petition") at 9, is as unfounded as it is unfortunate.

Finally, there is no compelling reason for the Court to review the Law Court's decision upholding the reopener clauses in the certification. The Law Court's decision conflicts with no case law and is consistent with *PUD 1.* That case interpreted the states' conditioning authority under Section 401(d) broadly, declining to read an implied limitation thereof from FERC's licensing authority under the FPA. 511 U.S. at 721-723. *See also, American Rivers, Inc. v. FERC*, 129 F.3d 99, 111-112 (2nd Cir. 1997) (rejecting argument that requiring FERC to accept state-imposed reopener conditions conflicted with FERC's licensing authority under the FPA).

I. THE COURT SHOULD DENY THE WRIT ON THE FIRST QUESTION BECAUSE THE ISSUE NOW RAISED BY PETITIONER WAS NOT FULLY ARGUED BEFORE OR EVALUATED BY THE LAW COURT.

As revealed by petitioner's characterization of the first question, the core issue it wishes to argue on appeal is the application of *Miccosukee* to Section 401, or more particularly, whether a "discharge" under Section 401 "requires the addition of water from a distinct body of water," as does a "discharge of pollutants" under Section 402. This question, however, was never squarely argued to or considered by the Maine Law Court, and this Court should decline to consider it here. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) (except for very rare exceptions, in

reviewing state court judgments, Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court).

Petitioner failed to cite to *Miccosukee*, Section 402 or the cases interpreting Section 402 on which it now relies for support of the "addition from a distinct body of water" test. Petition at 17.[6] Petitioner attempted to bring *Miccosukee* to the Law Court's attention after oral argument, notwithstanding that the case had been decided four months before petitioner filed its brief on the merits and eight months before argument.[7] Petitioner made no motion to supplement its brief, or for reconsideration on the basis of this argument; and the decision of the Law Court never addresses *Miccosukee* or its application to this case. Because of the manner in which petitioner litigated this matter, the Law Court did not explore or evaluate this issue, and it is improper to present it in these circumstances to this Court.

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[6] Petitioner cited *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) for the separate proposition that the dams in question do not discharge "pollutants," a proposition never contested in this case. Law Court Brief of S.D. Warren Co. at 13.

[7] Letter to James Chute, Clerk of the Law Court, from Matthew D. Manahan, dated January 7, 2005.

II. THE MAINE LAW COURT'S DECISION APPLYING SECTION 401 DOES NOT CONFLICT WITH *MICCOSUKEE* AND ITS INTERPRETATION OF SECTION 402, BECAUSE THESE SECTIONS USE DIFFERENT LANGUAGE AND HAVE DIFFERENT PURPOSES.

In *Miccosukee*, the Court considered whether the activity involved a "discharge of pollutants," and therefore whether a NPDES permit was necessary under Section 402. The Law Court in this case was asked to consider whether the projects "may result in any discharge," and thus require a certification under Section 401. *Miccosukee*, and the line of cases upon which it relies, do not involve the same question of law as was before the Law Court, which was considering a separate section of the Clean Water Act that uses different language and has a different purpose.

The Court held in *Miccosukee* that pumping water from one part of a water body into another part of the same water body does not constitute an "addition" of pollutants, and thus does not require a NPDES permit. *Miccosukee*, 541 U.S. at 109-110. In making this determination, the Court relied on *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2nd Cir. 2001). *Ibid. Trout Unlimited* described a line of precedent holding that dams do not require NPDES permits under Section 402, because (1) they "add" nothing to the water; and (2) dam-induced water quality impacts are not "pollutants." *Trout Unlimited*, 273 F.3d at 491-492. These cases were based in large part on deference to EPA's interpretation of Section 402. *See Gorsuch*, 693 F.2d at 164-166, 182; *see also National Wildlife Federation v.*

Consumers Power Co., 862 F.2d 580, 584-586 (6th Cir. 1988).

Section 402 and Section 401, however, use different terms that are separately defined. Section 402 requires a permit for "the discharge of any pollutant" under the NPDES program. 33 U.S.C. § 1342(a). Section 401, on the other hand, requires state certification for "any activity . . . which may result in *any discharge* into the navigable waters." 33 U.S.C. § 1341(a) (emphasis added). The term "discharge of pollutants" is defined to "*mean*[] . . . any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). "Discharge" is defined by a statement of inclusion:

> The term "discharge" when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants.

33 U.S.C. § 1362(16) (emphasis added). The term "discharge" thus encompasses a broader class of activities than a "discharge of pollutants."

To accept that "discharge" in Section 401 is limited to "discharge of pollutants" in Section 402, as petitioner urges, would require reading "means" synonymously with the word "includes." However, "[u]nder the usual rules of statutory interpretation, use of two different terms is presumed to be intentional." *Gorsuch*, 693 F.2d at 172 (citation omitted). In Section 502 of the Clean Water Act, Congress has employed "means" for every one of the 23 definitions listed, except the definition of "discharge," which uses the term "includes." As stated by this Court in a different context:

> The natural distinction would be that where "means" is employed, the term and its definition

> are to be interchangeable equivalents, and that the verb "includes" imports a general class, some of whose particular instances are those specified in the definition.

Helvering v. Morgan's Inc., 293 U.S. 121, 125-126, n. 1 (1934).

The use of the separate terms comports with the purposes and intent of the two sections. Section 402 was enacted by Congress as part of the 1972 amendments to the Federal Water Pollution Control Act with the goal that the "discharge of pollutants into the navigable waters be eliminated by 1985," 33 U.S.C. § 1251(a)(1). *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 203 (1976). This was to be accomplished by the creation of strict technology-based restrictions for discharges of pollutants from point sources. *Id.* at 204-205. The NPDES permit program in Section 402 was established "as a means of achieving and enforcing effluent limitations." *Id.* at 206.

Section 401, on the other hand, is the means by which states may apply their water quality standards to federally licensed activities. Water quality standards provide a "supplementary basis," upon which to protect water quality. *PUD 1*, 511 U.S. at 704 (citation omitted). Water quality standards consist of, among other things, designated uses of the navigable waters, including the protection and propagation of fish and wildlife and recreation in and on the water. 33 U.S.C. §§ 1251(a)(2), 1313(c)(2)(a). The protection of these uses plainly requires conditions that go beyond simply restricting the discharge of pollutants. In *PUD 1*, the Court held that the states' conditioning authority under Section 401 extended to the establishment of minimum flows for the protection of fish. *PUD 1*, 511 U.S. at 719-720. It would

make little sense for Congress to require the states to establish designated uses of their waters, give them broad conditioning authority under Section 401 to protect those uses, and then restrict the use of this authority to the narrow range of facilities that discharge "pollutants."

In addition, as the record in this case demonstrates, dam-induced changes to water quality, while not constituting a "discharge of pollutants," are nonetheless "pollution." 33 U.S.C. § 1362(19) ("[t]he term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water"). Congress recognized the "primary responsibilities and rights of States to prevent, reduce, and eliminate *pollution*." 33 U.S.C. § 1251(b) (emphasis added). Both the rights of the states, reserved in Section 101(b), 33 U.S.C. § 1251(b), and the goal of the Clean Water Act to restore the "chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), are advanced by Congress's choice of the term "any discharge" in Section 401. *See FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, ¶ 21 (2005). The decision of the Maine Law Court in *S.D. Warren* is therefore a logical interpretation and application of Section 401 to dams that have potential to alter, and have altered the water quality of the rivers, even though they do not involve a "discharge of pollutants."

In *Miccosukee,* the Court did not have before it the issue of what constitutes a "discharge" under Section 401, and thus never considered the language of Section 401, its purpose or its interpretation by the EPA or the courts. To state that the Law Court's decision "directly contradicts this Court's decision in *Miccosukee*," Petition at 8, is therefore to misstate the holding in that case. Moreover, to claim that the reasoning in *Miccosukee* applies to Section

401 ignores the critical factors distinguishing Section 401 and Section 402.

III. THE LAW COURT'S DECISION REGARDING WHAT CONSTITUES A DISCHARGE UNDER SECTION 401 DOES NOT CONFLICT WITH THE DECISIONS OF UNITED STATES COURTS OF APPEALS, AND IS CONSISTENT WITH THE LONGSTANDING INTERPRETION BY THE EPA AND FERC.

A. The Law Court's Decision is Consistent with Decisions of United States Courts of Appeals.

Petitioner's arguments now appear to be two-fold: no Section 401 certification is needed because, first, there is no discharge of "pollutants," and, second, there is no addition from a separate body of water. The Maine Law Court rejected petitioner's claim that a "discharge" under Section 401 is limited to a "discharge of pollutants," and concluded that "water that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway." App. at A-8 to A-10.

No case has held that a prerequisite to Section 401 certification is the discharge of "pollutants," and the difference in language and purpose discussed above supports the Law Court's conclusion to the contrary. Similarly, no case has held that relicensing of a dam does not result in an "addition" to the river for purposes of Section 401 certification because dam releases come from the same body of water.

In *Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003), which involved a proposed amendment to an existing FERC license, the Court of Appeals for the District of Columbia Circuit[8] concluded that flows of water through a dam constituted a "discharge" triggering Section 401, even though the flows were from the same body of water and contained no "pollutants." *Id.* at 293-294. The court found that "the word 'discharge' [in Section 401] contemplates the *addition* . . . of a substance or substances," *Alabama Rivers*, 325 F.3d at 299 (citation omitted) (emphasis in original), and increased flow of water was found to be such a discharge.[9] *Cf. Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998), *cert. denied*, 528 U.S. 964 (1999) ("'discharge' [in Section 401] is the broader term because it includes all releases from point sources, whether polluting or not polluting. . . . This is the logical interpretation of § 1362(16) that comports with the structure and lexicon of the Clean Water Act").

The Court of Appeals made no attempt to import wholesale into Section 401 the more narrow interpretation

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[8] The District of Columbia Circuit Court of Appeals is the only court of appeals that has interpreted "discharge" in Section 401 in the context of a FERC licensing proceeding. Other courts of appeals decisions now cited by petitioner in support of the so-called "outside world" test, Petition at 17, involve the interpretation of "discharge of pollutants" in the context of Section 402, and are therefore inapposite. *See Trout Unlimited*, 273 F.3d 481; *Consumers Power*, 862 F.2d 580; *Dubois v. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996).

[9] The fact that *Alabama Rivers* involved an increase of flow in the context of a license amendment is immaterial to this case because a relicensing involves "a new commitment of public resources for the term of the new license, rather than a continuation of the *status quo*." *FPL Energy*, 111 F.E.R.C. ¶ 61,104. Thus, a relicensing may always be said to involve "new" or "added" flows, whether or not an increase is proposed. *See* discussion *infra* at 20.

of "addition," as applied to Section 402 in a line of cases beginning with its own opinion in *Gorsuch*, 693 F.2d 156. The court instead recognizes that the "focus of [the definition of 'discharge of pollutants'] is on the regulation of pollutants *rather than the general regulation of project discharges*." *North Carolina*, 112 F.3d at 1187 (emphasis added). *See also PUD No. 1*, 511 U.S. at 711 (no dispute that certification was required where petitioners "concede that, at a minimum, the project will result in two possible discharges," including "the discharge of water at the end of the tailrace after the water has been used to generate electricity").

B. The Law Court Decision is Consistent with the Interpretations of EPA and FERC.

The Maine Law Court's decision is consistent with the interpretation of Section 401 by the EPA. In its *amicus curiae* brief supporting affirmance in *PUD No. 1*, 511 U.S. 700, the Solicitor General wrote on behalf of the United States, including the EPA, that "when the operator of the dam releases water through a crest-gate, sluice-gate, release valve, or other similar device, it has caused a discharge within the meaning of Section 401." *Brief for the United States as Amicus Curiae Supporting Affirmance*, 1992 U.S. Briefs 1911. Law Court App. at 272. In support of this position, the Solicitor General found that "Congress employed the term 'discharge' when used without qualification (as in Section 401(a)) more broadly than the term 'discharge of any pollutant'." *Ibid.* The Solicitor specifically recognized the Section 401-Section 402 distinction:

> Petitioners cite [*Consumers Power* and *Gorsuch*] for the proposition that hydropower structures do not cause a "discharge" that may be addressed under Section 401. Those cases, however, involve the scope of the term "discharge of any pollutant" under Section 402.

Ibid.

The EPA is the agency charged with implementing the Clean Water Act, including Section 401. *Alabama Rivers*, 325 F.3d at 296-297. There is no reason to believe that the formal position of an *amicus* brief submitted to this Court does not reflect the agency's "fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). As such it is entitled to deference. *Id.* at 462. At the very least, EPA's interpretation, which conforms to the plain language of the statute, is highly persuasive, and is thus "entitled to respect," representing as it does "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944); *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Similarly, FERC's regulations require certification for all license and relicensing applications, without regard to whether the water above and below the dam are from the same water body or the discharge contains a "pollutant." 18 C.F.R. §§ 4.34(b)(5)(i), 16.8. *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 61,210, ¶ 12 (2004) (suggestion that the operation of a hydroelectric project does not require Section 401 certification is "inconsistent with [18 C.F.R. § 4.34(b)(5)] and with long-standing practice").

FERC has recently addressed the question of whether the proposed relicensing of a dam that involves no "discharges of pollutants," results in a "discharge" under Section 401 requiring state certification. *FPL Energy Maine Hydro LLC,* 111 F.E.R.C. ¶ 61,104. FERC specifically

rejected the same arguments made by the petitioner here, finding that: (1) a "discharge" does not require the addition of some substance to the water being discharged; (2) the plain meaning of the word "includes" shows that the definition of "discharge" is broader than, and thus not limited to, "discharge of pollutants"; and (3) relicensing necessarily "results" in a discharge, because without a new license, the discharge will not be authorized to continue. *Id.* at ¶¶ 17-25. FERC has also rejected the argument that the reasoning in *Miccosukee* applies to Section 401, and specifically that water quality certification cannot be required where water "is flowing continuously in the same river." *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 61,210, ¶¶ 10-11.

FERC indicated the need for a certification in the course of licensing petitioner's projects. Law Court App. at 119, 238. FERC has now issued licenses for those projects that incorporate all conditions imposed by the water quality certification, and has given no indication that it disagrees with the State's assertion of Section 401 certification authority. *FERC Licenses*, 105 F.E.R.C. ¶¶ 61,009 to 61,013.

In short, there is no basis for petitioner's assertion that there is a split of authority with regard to the application of Section 401 to dam relicensings. Petitioner's list of four allegedly "distinct interpretations," Petition at 17, fails to take into account the distinction between Sections 401 and 402 and seizes on non-material differences in approach.

IV. THE MAINE LAW COURT'S DECISION DOES NOT CONFLICT WITH FERC'S LICENSING AUTHORITY UNDER THE FPA.

The Maine Law Court also found that the reopener clauses contained in the certification are within the scope of the DEP's conditioning authority under both Section 401(d) and Maine law, and are not prohibited by the FPA. App. at A-12 to A-16. These holdings do not conflict with any court opinions or FERC opinion, therefore arguing against consideration by this Court.

A. The Certification Was Within the Scope of the State's Authority Under Section 401.

The FPA creates a "broad federal role in the development and licensing of hydroelectric power." *American Rivers*, 129 F.3d at 111 (citation omitted). The Clean Water Act, however, has "diminished" the reach of the FPA by "expressly requiring the Commission to incorporate into its licenses state-imposed water-quality conditions." *Ibid.* Petitioner recognizes that "in adopting Section 401 of the CWA Congress intended to expand the scope of state involvement in federal licensing proceedings," Petition at 25, but argues that the lower court's decision impermissibly expands the scope of Section 401 in three ways. None of petitioner's arguments raises an issue meriting this Court's consideration.

Petitioner first reiterates its argument that a discharge must contain "pollutants" before triggering Section 401 review. As discussed above, petitioner's theory is contrary to the plain language of Sections 401 and 502, the decisions of the courts of appeal that have interpreted

those sections, and the interpretation by the agencies charged with their implementation.

Petitioner next contends that the Maine Law Court erred because relicensing will not "result in" any new discharge in this case, as required by Section 401, but will merely authorize the continuation of a pre-existing discharge. This argument ignores the nature of project relicensing under the FPA, as FERC recently held when presented with the identical issue:

> We disagree. Relicensing *represents a new commitment of public resources* for the term of the new license, rather than a continuation of the *status quo*. The project needs a new license to continue operating and must ultimately shut down if a new license cannot be obtained. Thus, any pre-existing discharge will not be authorized to continue in the future unless a new license is obtained.

FPL Energy, 111 FERC ¶ 61,104, ¶ 25 (emphasis added) (citation omitted). *See also* 16 U.S.C. § 808(a) ("the Commission is authorized to issue a new license . . . upon such terms and conditions as may be authorized or required under the then existing laws and regulations"); *see also Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 470 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) (FERC must "make the same inquiries on relicensing as on initial licensing").

Finally, petitioner argues that Section 401 does not authorize "reopeners." Section 401(d) provides that any certification "shall set forth *any* effluent and other limitations . . . *necessary to assure* that any applicant for a Federal license or permit will comply" with the State's water quality standards. 33 U.S.C. § 1341(d) (emphasis

added). In interpreting this section, this Court confirmed that "States may condition certification upon *any* limitations necessary to ensure compliance with state water quality standards." *PUD 1*, 511 U.S. at 713 (emphasis added). The Maine Law Court found that the reopeners were "essential" to ensure that water quality standards would be met for the forty-year term of the license. App. at A-15 to A-16. The Maine Law Court thus rightly found that the reopener clauses "fit within both the literal language of Section 401(d)" and the statutory interpretation of that section by this Court.[10]

B. The Maine Law Court's Decision Does Not Conflict with the FPA Which Contains No Implied or Express Limitation on the States' Authority Under Section 401.

The Maine Law Court held that the reopeners were not only authorized by Section 401(d), 33 U.S.C. § 1341(d), but also that the FPA did not prohibit reopeners. App. at A-13 to A-14. Nothing in the case law or the statute conflicts with that holding.

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[10] Petitioner's reliance on Section 401(a)(5), 33 U.S.C. § 1341(a)(5), is misplaced. Petition at 22. This provision provides a remedy – the suspension or revocation of the federal license – in the event of a project's violation of the Clean Water Act, including the conditions contained in the certification. It does not speak to what the conditions of that certification may or may not be. Similarly, Section 401(a)(3), 33 U.S.C. § 1341(a)(3), does not speak to whether a state may reserve the right to reopen a condition of certification during the term of a license; but rather to the need for an additional certification when a project requires an operating permit from a separate federal agency than that issuing the construction permit.

Petitioner argues that Section 6 of the FPA, 16 U.S.C. § 799, expressly prohibits states from attaching reopeners to their certification conditions because it prohibits the alteration of licenses except upon mutual agreement between the licensee and FERC. Petition at 26. While the issue has not been addressed in the context of a Section 401 certification, courts have rejected the argument that Section 6 prohibits reopeners in FERC licenses. Finding that Section 6 "must not be given a construction which is impracticable of application," the Court of Appeals for the Ninth Circuit held that FERC may include reopeners in licenses where it is reasonably foreseeable that a need for further measures may develop, but "either the dimensions of the need or the way of meeting it is not presently ascertainable." *California v. FPC*, 345 F.2d 917, 924-925 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965) (upholding reopener clause in FERC license allowing FERC to re-evaluate minimum flows after twenty years); *see also Wisconsin Pub. Serv. Corp. v. FERC*, 32 F.3d 1165, 1168-1169 (7th Cir. 1994) (upholding reopener clause in FERC license requiring dam owner to provide such fishways as might in the future be prescribed by the Secretary of the Interior).

Petitioner next contends that FERC's primacy in hydropower project licensing, recognized first by this Court in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), implicitly limits the states' authority under Section 401. The *First Iowa* line of cases cited by petitioner, however, did not seek to limit the exercise of a state's authority granted by Congress under Section 401, but rather a state's authority to regulate hydropower projects under state statute. These cases are plainly distinguishable from the case at hand. While the FPA has a wide preemptive reach with regard to state statutes

seeking to regulate hydropower projects, "[t]he CWA . . . has diminished this preemptive reach." *American Rivers*, 129 F.3d at 111.

Petitioner ignores this Court's more recent decision in *PUD 1*, 511 U.S. 700, where the Court addressed the issue of whether FERC's broad licensing authority under the FPA implicitly limits the states' conditioning authority under Section 401(d). *Id.* at 721-723. In that case, the Court specifically declined to limit the states' authority under Section 401, rejecting the assertion that the states' conditioning authority conflicted with FERC's "comprehensive authority" under the FPA. *Id.* at 720-721. The Court held that because Section 401 applies to statutes and regulatory schemes in addition to the FPA, and because any conflict in that case was hypothetical, it was "unwilling to read implied limitations into § 401." *Ibid.*

In *American Rivers*, 129 F.3d 99, the court held that FERC could not refuse to include state-imposed certification conditions in a FERC license, including reopeners. *Id.* at 112. The court reasoned that the inclusion of such conditions was not incompatible with the 1986 amendments to the FPA, as petitioner claims here, as long as the licensee may appeal those conditions in a court of proper jurisdiction as outside the scope of Section 401, and FERC may refuse to issue a license. *See also Central Maine Power Co.*, 82 F.E.R.C. ¶ 61,191 (1998) ("under the recent decision in *American Rivers* [citation omitted] a state may modify a water quality certification when the state has reserved such authority in the certification").

Here, petitioner has appealed the reopeners as outside the scope of Section 401 conditioning authority, and FERC chose not to deny the permit. To the contrary, FERC has

issued the licenses and included the reopeners without comment or objection. *FERC Licenses*, 105 FERC ¶¶ 61,009 to 61,013. FERC's licensing authority under the FPA has thus been adequately protected. *American Rivers*, 129 F.3d at 112. Moreover, any conjecture that the exercise of those reopeners sometime in the future would conflict with some action of the FERC is merely hypothetical. The State could decide not to exercise its rights under the reopeners. Assuming the DEP chose to impose further conditions on the license based upon the studies required, petitioner would have the right to contest and appeal those conditions. It is more appropriate to consider the reopener issue in a clear factual context, rather than a hypothetical situation which may never come to pass.

In sum, petitioner has failed to show that the issuance of the certification, and in particular the reopener provisions contained therein, conflicts with any court opinion, exceeds the State's authority under Section 401, or is in conflict with the FPA or FERC's authority thereunder. There is thus no compelling need for this Court to clarify the state and federal role in hydropower relicensing as requested by petitioner.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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